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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 213

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

WILLIAM G. GILCHRIST, JR., WILLIAM G. GILCHRIST, III and JAMES BLYTHE, Trustee for ROBERT A. GILCHRIST, a minor, Partners, d/b/a GILCHRIST & SONS; and G & R COAL CO., INC.

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

SNYDER AND RANDOLPH, INC.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF

Petitioner does not reply seriatim, to respondents' arguments in opposition to its petition since petitioner believes that answers to respondents' arguments are

contained in the petition. Petitioner further believes, however, that a reply to the following matters will be helpful to the Court:

REPLY TO RESPONDENTS' BRIEF ON QUESTION NUMBER ONE

1. Response to Respondents' Contention That the Issue Raised in Question Number One Was Not Raised in the Courts Below.

In Question Number One in its Petition for Writ of Certiorari and in its discussion thereof, UMW urged as a reason for granting the writ that the union activity involved in this case was primary and not secondary within the contemplation of Section 303 of the Labor-Management Relations Act, 1947 (29 USC Sec. 187). UMW asserted, as the basis for its contention, that any inducements which resulted in a refusal of contract truckers to haul coal for respondents occurred at the entrance to one of the mines involved and at the entrance to the tipple operated by one of the producing companies, the respondent G & R, and used by both producing companies, the respondents G & R and S & R.

Respondents, in their brief on Question Number One, erroneously state that this "is the first time this argument has been presented in these cases" (Respondents' Brief, Page 8).

The issues in the case were spelled out by the District Court in a pre-trial order. The first three issues stated therein are as follows (R. 49):

> "1. Did the defendant induce or encourage the employees of an employer doing business with the plaintiffs, or any of them, to concerted action?
>
> "2. If such inducement or encouragement is shown to have occurred, was an object thereof an

object prescribed by the Labor-Management Relations Act?

"3. If such inducement or encouragement of concerted action is shown to have occurred, did it take place at places other than the premises occupied by the plaintiffs?"

Each of these three issues supports the issue presented in Question Number One. The third issue is precisely to the point.

In the Court of Appeals, UMW specifically urged in its Question Number Two in that Court, the absence of a Section 303 violation on the ground that the truckers involved (who, as stated above, hauled coal from the respondents' mines to a common tipple and who thus performed work at common places of business with respondents as a normal part of respondents' operations) were not neutrals. The factual analysis to the argument contained repeated references to union inducements of truckers at the entrance to one of the mines and the entrance to the tipple. Though no precise reference was made in that argument to the fact that such inducements occurred only at primary premises, we consider, particularly in light of the admitted fact that such truckers performed the substantial part of this work on premises occupied and or used in common with the primary employers (G & R and S & R), that the question posed by Question Number One was fully embraced therein.

UMW also, in its Question Number Six in the Court of Appeals and in its prayer for relief sought thereunder, contended that the evidence was not sufficient to show that it "unlawfully interfered with and destroyed plaintiffs' business . . . in violation of Section

303 of the Labor-Management Relations Act and the common law of . . . Tennessee and Kentucky;" and here with particular reference to the operating company, S & R, the absence of evidence of secondary inducement was urged. Though this statement was made in connection with the observation that UMW sought to organize contract truckers[1] as well as the mining and tipple employees of the operating companies, we conceive that that argument fairly permits present argument of the question raised by Question Number One.

The emphasis which petitioner places on the issue raised by Question Number One, of course, stems from this Court's decision in *Local 761, Int'l. Union of Radio and Machine Workers* v. *NLRB*, U.S. , 6 L. ed. 2d 592, which was announced after the Court of Appeals' decision in the instant case. We submit that the *Machine Workers* decision is plainly inconsistent with the reasoning expressed in the immediate precedent for the instant case *UMWA* v. *Osborne Mining Co.* (CA 6, 1960), 279 F. 2d 716, cert. denied 364 U.S. 881, in which the Court of Appeals found no significance, under Section 303, in the fact that union activity occurred at a primary employer's premises. The explicit reliance on the *Osborne* decision by both the District Court and the Court of Appeals in the instant case (R. 124, 125; Appendix to Petition 7a) confirms that the disposition of the instant case was based on the reasoning expressed therein. Accordingly, petitioner submits that review of the issue posed by Question Number One is clearly warranted and proper.

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[1] The solicitation of respondents' truckers for union membership is shown in the record (R 829, 895, 902, 918-919).

2. The Union Activities Upon Which the Section 303 Violation Was Based Occurred at the Mine and Tipple Entrances.

On pages 11 and 12 of respondents' brief numerous citations to the record are made in an effort to show that contract trucks hauling coal for respondents were induced, at places removed from the primary employers' premises, to refuse to work for respondents G & R and S & R.

These references, however, only serve to establish petitioner's insistence.

At one point (respondents' brief, page 11) respondents say that petitioner "intercepted" contract truckers "on the public highway about two miles distant from the G & R mine," giving record citations R. 370 and 380. Respondents overlook the fact that this location was entrance of the private road leading from the public road to the mine. The witnesses whose testimony respondents cite is positive (R. 369, 379).

Similarly respondents say that S & R truckers were "intercepted . . . at a point approximately six miles from the S & R mine," citing R. 586, 666-669. Respondents fail to point out, though the testimony cited shows, that these incidents occurred at the entrance of the tipple operated by G & R, from whom petitioner sought a contract. Respondents apparently contend that primary activity at the G & R tipple became secondary for the simple reason that someone other than a G & R employee came there to engage in business and was persuaded not to do so by reason of that activity.

The fact that coal miners were seen on the streets of the mining town in which G & R's tipple was located and that motorcades of union men driving on public

roads advertised their dispute in which 3,700 men were involved are relied upon by respondent to show a "secondary boycott." If such facts are sufficient to establish a violation of Section 303 it is manifest that it will be difficult, if not impossible, for union men working at widely separated establishments to strike in sizeable numbers without running afoul of a prohibition which Congress "narrowly conceived." *United Brotherhood of Carpenters* v. *NLRB,* 357 U.S. 93.

On page 18 of respondents' brief, respondents assert that certain record citations (R. 208, 214, 221, 287, 288, 304) establish that UMW's objective was to cause S & R to cease doing business with Gilchrist and Sons. We submit that the record totally fails to establish such an objective. The plain objective of UMW was to obtain collective bargaining agreements from G & R and S & R. The fact is that S & R sold its coal to Gilchrist and Sons and delivered its coal to a tipple *owned* by Gilchrist and Sons and *operated* by G & R. Respondents seem to argue that union activity at the G & R tipple was secondary to G & R because it involved S & R and that it was secondary to S & R because it caused S & R truckers not to unload coal at the G & R tipple. Respondents then argue, on the basis of the record pages cited above, that union activity at G & R was secondary to Gilchrist and Sons because Gilchrist and Sons would have purchased S & R coal upon its delivery to G & R.

To attribute such a multitude of objectives to union activity at the sole entrance to the premises of an employer from whom the union seeks a collective bargaining agreement is to destroy the practical aspects of the Congressionally intended and judicially recognized limitations on the proscription of Section 303, yet it is

upon this construction of Section 303 that the judgment against petitioner is based.

The decision in the instant case demonstrates the necessity for further clarification of what does and what does not violate this important section of the Labor-Management Relations Act.

REPLY TO RESPONDENTS' BRIEF ON QUESTION NUMBER TWO

Notwithstanding Its Relationship to G & R. Gilchrist and Sons Was Neither a Primary Employer Nor a Neutral Through Which Pressure Was Brought to Bear on a Primary Employer. It Is, Therefore, Not Entitled to Maintain an Action Under Section 303.

Respondents detail in their brief the various ways in which Gilchrist and Sons had "integrated" its operation with that of G & R, such as by furnishing the land on which G & R operated, the equipment which G & R used and certain services which facilitated the latter's operation.

This does not obscure the fact that Gilchrist and Sons did not perform those functions which lead to G & R's role of a primary employer in a labor dispute. Petitioner therefore urges that if its activities were secondary as to G & R (one of the producing companies from which it sought an agreement) they were not secondary to Gilchrist and Sons, and that the damages Gilchrist and Sons sustained were necessarily not immediate but were in consequence of its relationship to a primary employer. As such, petitioner insists its damages are not actionable under Section 303.

Respondents take issue with our contention that Gilchrist and Sons' role is similar to that of Love and Amos in *UMWA* v. *Love and Amos Coal Company* (CA 6), 279 F. 2d 716, saying that Gilchrist and Sons

was far more involved in the controversy than was Love and Amos, a coal sales agent. Petitioner has never insisted that the relationship was identical. Our insistence is that they occupied roles not materially distinguishable in that neither was the employer of employees involved in the dispute and in that neither was primarily or secondarily involved in the dispute.

It is most assuredly clear that Gilchrist and Sons' relationship to S & R from whom it purchased coal for sale and to whom it leased no equipment, approaches almost to the letter the Love and Amos role, yet losses sustained by reason of the inability of S & R to mine coal was part of the "secondary boycott" for which Gilchrist and Sons recovered.

But whether considered in light of its relationship to G & R or to S & R, Gilchrist and Sons was at least one step beyond the protection intended by Congress in enacting Section 303.

REPLY TO RESPONDENTS' BRIEF ON QUESTION NUMBER FOUR

Petitioner's Liability for the Destruction of Respondent's Property Was Not Predicated on Circumstantial Evidence But on the Erroneous Application of a Rule Permitting Adjudication of Vicarious Liability for Unauthorized Acts.

Respondents insist that the question of whether UMW was responsible for the destruction of the G & R tipple and the S & R auger is one of fact on which the courts below have concurred. Respondents further insist that the conclusion of liability was properly reached on the basis of circumstantial evidence.

Respondents' position is not responsive. We do not ask this Court to review a question adjudicated on the basis of circumstantial evidence. The District Court *did not rely on circumstantial evidence* in concluding

that UMW was liable for the acts in question. To the contrary, the District Court's opinion (affirmed without discussion of the point by the Court of Appeals) was based upon the purported applicability of a rule expressed thusly in Section 915, Restatement of Torts, cited and relied upon by the District Court (R. 132):

> "A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it was expectable, except where the harm resulted from an outside force, the risk of which was not increased by the defendant's act."

Application of this rule was not based upon circumstantial evidence. It was based on the fact, as found by the Court, that defendant in picket line activity tortiously induced respondents' employees to cease work. There is no evidence that UMW damaged any property or that it induced others to do so. The District Court simply translated picket line activities into a basis of liability for acts of an entirely different character. Defendant's picket line activities—during which not a man was harmed and no property of any kind was damaged—according to the District Court, "created among its members a spirit of lawlessness and animosity toward the operation of plaintiff's coal business, thereby creating a situation or climate in which the risk of harm to their properties was greatly increased (conclusion of Law 14, R. 132)". The record does not show that Petitioners created among its members a "spirit of lawlessness and animosity," nor does it show that such acts of violence were committed by its members. And in the same conclusion, citing the Restatement rule quoted above, the District Court then ruled thusly:

> "Its (defendant's) conduct was a substantial factor in causing the damage to the tipples of the

> plaintiff, Gilchrist and Sons, and to the auger of the plaintiff, Snyder and Randolph, Inc. The defendant is liable for this damage sustained by the plaintiffs from the interruption and destruction of their businesses *even though the result may have been contributed to by other forces and even though the acts of others not authorized by the defendant may have contributed to the result.*"

In an aspect of our industrial life in which intensity of feeling is judicially recognized as "difficult to prevent". *Republic Steel Corp.* v. *NLRB* (CA 3), 107 F. 2d 472, 479, and in an industry once noted for its use of the *agent provocateur,* the District Court employed, as a basis of liability, a rule of law never, as petitioner is advised, applied heretofore in a comparable context. Concurrence on the application of such a rule does not foreclose review, for clearly the issue is one in which an "issue of law (is) entwined." *Lustig* v. *U.S.*, 338 U.S. 74, 77.

The District Court's sweeping decree of outlawry, which would permit a union found errant in prior acts to exercise thereafter the federally guaranteed right to engage in concerted action only at the risk of being a guarantor, presents a question of first importance which has not been, but which should be, decided by this Court.

On page 36 of their brief, respondents state that certain individuals, arrested subsequent to one of the acts in question, "became implicated in participation in this dynamite explosion." Respondents neglected to state that the evidence to which it referred was not admitted as substantive evidence to any extent on the question of liability. It was admitted only on the question relative to damages and minimization of damages.

of why S & R "moved their operation" (District Court's memorandum, R. 97).

Respectfully submitted,

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